

MEMO

FROM: Jim McLaughlin, on behalf of the Trusts Drafting Committee

TO: General Statutes Commission

RE: DN 14-6, Nonademption of Specific Devises

DATE: February 2, 2017

At the request of our Revisor of Statutes, Mr. Floyd Lewis, this memo is being written to affirm the committee's desire to see this proposal move forward in the legislative process and hopefully become adopted by our State Legislature.

The committee understands the Clerks of Court oppose the passage of this proposal. However, after much study and discussion, the committee and the North Carolina Bar Association's Estate Planning and Fiduciary Law Section's legislative committee (LC) agree this proposal is a good one. While LC expressed some concerns when the Trusts Drafting Committee (TDC) originally proposed an earlier version, once the TDC and the LC discussed the matter, the TDC agreed to expand its earlier version as suggested by the LC. As a result, both the TDC and the LC are in agreement with the current proposal. The TDC and the LC, comprised of experts in the field of estate planning, would not support such a proposal without good reason. Representatives from both the TDC and the LC have appeared before the General Statutes Commission and discussed why we believe this is a good proposal. This was done with the full understanding of the opposition from the clerks.

The clerks appear to have two objections:

- (1) They believe the proposal will result in increased litigation; &
- (2) It is not needed.

It is assumed that objection (2) above indicates satisfaction with the current NC law. As the chart prepared by the Revisor's office indicates, much of the proposal is in fact consistent with current NC law. As to those provisions, an argument could be made that the proposal is not necessary. The TDC disagrees with this objection. Codifying the general rules is generally a good thing in that it affirms those rules to be those agreed upon by both the courts as the source of those general rules in the first place and the legislature. This affirmation is often the purpose, or at least a purpose, of such proposals. This objection is not a significant one in the opinion of the TDC.

Objection (1) above is arguably a more significant one. However, in the states adopting the equivalent of the current proposal, no significant increase in litigation has occurred. It is thought this is because the statute itself provides a basis for personal representatives of estates to decide how to handle certain fact patterns. With such legislation in place, the litigation has not increased. Therefore the TDC is of the strong opinion that this objection is without merit.

Perhaps a few more points are worth considering. Current NC law purports to be based upon the “identity theory” of ademption by extinction. Simply stated that theory states:

Ademption by extinction occurs when a testator devises a specific piece of property in his will and the testator no longer owns that property at his death. That specifically devised property is therefore adeemed, and the devise fails.

This appears simple enough. Unfortunately, nothing is ever as simple as it might appear at first glance. In a nut shell, the problem is that, while courts continue to pay lip-service to the “identity theory” of ademption by extinction, that rule has proven ineffective and has led to a series of “exceptions” which at times have led to both confusion and litigation. The proposal before you is basically identical to the UPC’s attempt to make this area of the law both clearer and more in tune with the most important thing in any will situation, to wit: following the intent of the testator.

While it is true that intent can be a slippery thing to figure out, the proposed statute has proven effective in the states that have adopted it. Litigation has not increased and estates have not been more difficult to administer. In short, it has worked well. The always stated objection of “it will increase litigation” is generally given when the real objection is we just don’t like it. There is no verifiable evidence to support this objection.

The TDC thinks it quite revealing that, while the so-called “identity theory” has been with us for over 200 years, right from the “get-go” courts started making exceptions to avoid the admittedly harsh results of its application in many fact patterns. The result has been that courts have gone to less than transparent techniques to prevent the rule from applying to the particular case at hand. How have the courts done this? In many ways. For example, courts often magically turn what is clearly a specific devise into a general or demonstrative devise because the identity rule only applies to specific devises. Or, a court might mysteriously “find” the missing asset by using a time-of-death or change-in-form only construction. All of a sudden what appeared to be an obvious ademption by extinction becomes a valid devise. Or, a court might create an express exception to the identity rule for sales or transfers by an attorney-in-fact- or guardian. The results are not always consistent in these case-by-case determinations. The current proposal is straight forward and reaches the correct result directly without the necessity of playing such games. The TDC thinks this is a good thing and believes setting the rules out clearly is also a good thing.

While much more could be said, it is believed that our previous meetings with the Commission have addressed this proposal with enough specificity.

In conclusion, the TDC respectfully requests this proposal go forth and be introduced in the upcoming term of our legislature.

Thank you, as always, for your consideration.

